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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BRUNO ANDRES ACEVES,

Defendant and Appellant.

H040751

(Santa Clara County

Super. Ct. No. C1369011)

Defendant Bruno Andres Aceves appeals from orders imposing probation. He contends that the mandatory revocation of his driving privilege pursuant to Vehicle Code section 13202 violates equal protection. He also contends that the trial court erred when it imposed a probation supervision fee. We reject defendant's contentions, but remand the matter for the trial court to determine the period of time for revocation of his driving privilege. Accordingly, the orders are reversed.

**I. Statement of the Case**

In May 2013, the Santa Clara County District Attorney filed a complaint in case No. C1355939. The complaint alleged possession of cocaine for sale (Health & Saf. Code, § 11351 – count one), possession of methamphetamine for sale (Health & Saf. Code, § 11378 – count two), and possession of marijuana for sale (Health & Saf. Code,

§ 11359 – count three). In September 2013, defendant pleaded no contest to counts one and two. Count three was dismissed. The trial court placed defendant on probation for three years on condition that he serve eight months in county jail.

In November 2013, the Santa Clara County District Attorney filed a complaint in case No. C1369011. The complaint alleged possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)), carrying a concealed firearm in a vehicle (Pen. Code, § 25400, subd. (a)(1)), and possession of cocaine (Health & Saf. Code, § 11350, subd. (a)). In January 2014, defendant pleaded no contest to all three counts. Counsel stipulated that there was a factual basis for the plea based on the police reports in the court's file. These reports established that defendant was stopped for a Vehicle Code violation and was found to be in possession of a loaded firearm and 2.6 grams of cocaine. The trial court also revoked probation in case No. C1355939.

In February 2014, the trial court placed defendant on probation for three years and ordered that he serve one year in county jail in case No. C1369011. The trial court also ordered that his driving privilege be revoked pursuant to Vehicle Code section 13202. As to case No. C1355939, the trial court reinstated probation and extended it to run coterminous with the term in case No. C1369011.

## **II. Discussion**

### **A. Vehicle Code Section 13202**

Defendant contends that Vehicle Code section 13202 violates equal protection, because it mandates revocation of a person's driving privilege following conviction of an offense related to some controlled substances, but not similar controlled substances.

Vehicle Code section 13202, subdivision (b) requires the court to order revocation of a person's driving privilege after his or her conviction of Health and Safety Code sections 11350, 11351, 11352, 11353, 11357, 11359, 11360, or 11361 when a motor vehicle was involved in the commission of the offense. These offenses include:

possession of opiates, opium and opium derivatives, cocaine and cocaine base, specified hallucinogenic substances, and narcotic drugs (Health & Saf. Code, § 11350); possession or purchase for sale of many of the same controlled substances and other narcotics (Health & Saf. Code, § 11351); transportation, sale, or giving away the controlled substances listed in Health and Safety Code sections 11350 and 11351 (Health & Saf. Code, § 11352); inducing a minor to violate the controlled substances provisions listed in Health and Safety Code section 11352 (Health & Saf. Code, § 11353); unauthorized possession of concentrated cannabis or specified amounts of marijuana (Health & Saf. Code, § 11357); unauthorized possession of marijuana for sale (Health & Saf. Code, § 11359); unauthorized transportation, sale, or giving away of marijuana (Health & Saf. Code, § 11360); and using a minor in unlawfully transporting, selling, or giving away marijuana (Health & Saf. Code, § 11361). However, subdivision (a) of Vehicle Code section 13202 allows the court to exercise its discretion in ordering revocation of a person's driving privilege after conviction of other offenses related to controlled substances when the use of a motor vehicle was involved in the commission of the offense.<sup>1</sup>

““The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.”” [Citation.] ‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification

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<sup>1</sup> Vehicle Code section 13202 provides in relevant part: “(a) A court may suspend or order that the department revoke in which case the department shall revoke the privilege of any person to operate a motor vehicle upon conviction of any offense related to controlled substances as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code when the use of a motor vehicle was involved in, or incidental to, the commission of the offense. [¶] (b) A court shall order that the department revoke and the department shall revoke the privilege of any person to operate a motor vehicle upon conviction of a violation of Section 11350, 11351, 11352, 11353, 11357, 11359, 11360, or 11361 of the Health and Safety Code when a motor vehicle was involved in, or incidental to, the commission of such offense.”

that affects two or more *similarly situated* groups in an unequal manner.’ [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’ [Citation.]” (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

Defendant points out that revocation of a person’s driving privilege for possession of heroin, cocaine, or marijuana (Health & Saf. Code, §§ 11350, 11351, 11352, 11357, 11359, 11360) when a motor vehicle was involved in the commission of the offense is mandatory, but revocation of a person’s driving privilege for possession of other controlled substances, such as methamphetamine, amphetamine, LSD, psilocybin, PCP, diazepam, or barbiturates (Health & Saf. Code, §§ 11375, 11377, 11378, 11378.5, 11379, 11379.5, 11391; Veh. Code, § 13202, subd. (a)) is discretionary.<sup>2</sup> Thus, he argues that both classes of offenders are similarly situated, because “[t]here is not a meaningful difference between heroin and PCP, or between cocaine and methamphetamine, or between marijuana and LSD” since “[t]hey are all Schedule I or Schedule II controlled substances. (Health & Saf. Code, §§ 11054, 11055.)”

The Attorney General notes that offenses involving substances that were previously classified as narcotics generally appear in Health and Safety Code section 11350 et seq. while offenses involving substances previously classified as restricted dangerous drugs generally appear in Health and Safety Code section 11376 et seq. (2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 87, 88, pp. 730, 732.) She then argues that since “[c]ontrolled substances formerly classified as narcotics fall into the category of listed substances resulting in mandatory revocation of driving privileges” while “[c]ontrolled substances formerly classified as restricted dangerous drugs fall into the category of listed substances for

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<sup>2</sup> Defendant also cites several other sections of the Health and Safety Code to support his argument that the Legislature’s classification violates equal protection. However, our analysis applies to these classifications as well.

which revocation is discretionary,” it is questionable whether defendant, “who possessed a narcotic, cocaine, is even similarly situated with an individual found in possession of methamphetamine, formerly a restricted dangerous drug.”

Even assuming that defendant is similarly situated to offenders who have been convicted of controlled substances that do not require revocation of a driving privilege, we find no equal protection violation.

“Where, as here, a statute involves neither a suspect class nor a fundamental right, it need only meet minimum equal protection standards, and survive ‘rational basis review.’ [Citation.]” (*People v. Turnage* (2012) 55 Cal.4th 62, 74.) “[E]qual protection of the law is denied only where there is no ‘rational relationship between the disparity of treatment and some legitimate governmental purpose.’ [Citation.] In other words, the legislation survives constitutional scrutiny as long as there is “any reasonably conceivable state of facts that could provide a rational basis for the classification.”’ [Citation.] This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. [Citation.] While the realities of the subject matter cannot be completely ignored [citation], a court may engage in “‘rational speculation”’ as to the justifications for the legislative choice. [Citation.] It is immaterial for rational basis review ‘whether or not’ any such speculation has ‘a foundation in the record.’ [Citations.]” (*Id.* at pp. 74-75.)

Defendant argues that offenses involving PCP are generally considered more serious and that cocaine is generally similar to methamphetamine. Thus, he claims that there is no rational basis for treating the two classes of offenders differently. We disagree.

Here, the Legislature could have rationally determined that the public and the individual would best be protected by the revocation of driving privileges for those individuals who have been convicted of offenses involving controlled substances that

have been historically considered the most dangerous. The Legislature could have also rationally concluded that the use of certain controlled substances was far more prevalent, and thus included these controlled substances in the classification requiring mandatory revocation of a person's driving privilege. Moreover, the state is not required "to strike at all evils at the same time or in the same way." (*Semler v. Oregon State Bd. of Dental Examiners* (1935) 294 U.S. 608, 610.) As our high court has stated, "under the rational relationship standard, a court may not strike down a classification simply because the classification may be imperfect [citation] or because it may be 'to some extent both underinclusive and overinclusive.'" (*Warden v. State Bar* (1999) 21 Cal.4th 628, 649, fn. 13, quoting *Vance v. Bradley* (1979) 440 U.S. 93, 108.) Accordingly, we conclude that Vehicle Code section 13202 does not violate equal protection.

Defendant also contends, and the Attorney General concedes, that the trial court failed to specify the period of time for revocation of his driving privilege under Vehicle Code section 13202, subdivision (c).<sup>3</sup> Thus, the case must be remanded for the trial court to make this determination.

## **B. Probation Supervision Fee**

Defendant next contends that the trial court failed to follow the correct statutory procedures in determining his ability to pay probation supervision fees. He also contends that there was insufficient evidence of his ability to pay these fees.

When defendant signed his plea agreement, he acknowledged that the trial court could impose a probation supervision fee not to exceed \$110 per month. At the

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<sup>3</sup> Vehicle Code section 13202, subd. (c) states: "The period of time for suspension or the period after revocation during which the person may not apply for a license shall be determined by the court, but in no event shall such period exceed three years from the date of conviction."

sentencing hearing, the trial court imposed, without objection, a \$35 per month probation supervision fee.

Prior to imposition of a probation supervision fee, Penal Code section 1203.1b requires: (1) the trial court to order the defendant to report to the probation officer, who determines the defendant's ability to pay the fee; (2) the probation officer to inform the defendant that he or she is entitled to a court hearing on his ability to pay the fee; and (3) the trial court to hold a hearing to determine the defendant's ability to pay unless the defendant waives his right to a hearing.<sup>4</sup>

However, a defendant who fails to object to the trial court's failure to comply with the procedural safeguards of former Penal Code section 1203.1b at the sentencing hearing forfeits his or her right to raise the issue on appeal. (*People v. Trujillo* (2015) 60 Cal.4th 850, 858-859.) The defendant is also precluded from raising the issue of his or her ability to pay probation-related fees. (*Ibid.*) Here, defendant failed to object to imposition of the probation supervision fee and thus has forfeited any challenge to it.

Defendant also claims that trial counsel rendered ineffective assistance by failing to object to imposition of the fee.

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<sup>4</sup> Former Penal Code section 1203.1b, subdivision (a) provides in relevant part: "[I]n any case in which a defendant is granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision . . . . The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver."

“To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel’s performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. [Citation.]” (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.)

Here, defendant has failed to show that trial counsel’s performance was deficient. There is nothing in the record to indicate that defendant did not have the financial resources to pay a monthly supervision fee of \$35. Since trial counsel may have reasonably concluded that there was no basis to object to imposition of this fee, defendant has failed to establish ineffective assistance of counsel.

### **III. Disposition**

The orders are reversed. The case is remanded for determination of the period of time for revocation of defendant’s driving privilege.



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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Márquez, J.